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Remarks of Richard D. Kahlenberg

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REMARKS OF RICHARD D. KAHLENBERG[†]

I want to thank Rosemary Salomone for inviting me to be a part of this panel. St. John's Law School has intrigued me for a number of years. About fifteen years ago, I met a distinguished alumnus, Mario Cuomo. I was a law student at the time and was not very happy about law school, so I was spending my time working on a book about Robert Kennedy. I went to interview Governor Cuomo because I believed that he represented the next Robert Kennedy. Upon my arrival, Governor Cuomo said to me, "Who are you, Kahlenberg?" And, because I am not a New Yorker, this took me aback. I said, "Well, I'm a student at Harvard Law School." He replied, "Why?" I started to ramble on about wanting to do public interest law on one hand, while on the other hand I wanted to make a lot of money. I told him that I thought about going to Yale, but I was not crazy about New Haven. He shot right back, "What happened? You couldn't get into St. John's?"¹ Since then, I have been intrigued to come here, and I am glad to now have the opportunity.

There are two ways to view *Brown v. Board of Education*.² The first is as a race case and the second is as an education case. By a race case, I mean that *Brown* stands for the proposition that classifications by race are inherently suspect, and in this sense, racial segregation in schools would be a legal injustice throughout society—as it later became illegal to segregate swimming pools or golf courses. The second way to think about *Brown* is as an education case. In this regard, the Court noted:

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¹ For a description of this encounter, see RICHARD D. KAHLENBERG, *BROKEN CONTRACT: A MEMOIR OF HARVARD LAW SCHOOL* 3–4 (1992).

² 347 U.S. 483 (1954).

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³

This right is twofold; it encompasses a procedural right not to be discriminated against based on race and a substantive right to an equal educational opportunity.

As Michael Rebell has indicated, the substantive right was demolished at the federal level in *San Antonio Independent School District v. Rodriguez*.⁴ That said, advocates have done a great deal of work at the state level trying to fill in a substantive right to equal educational opportunity. However, I believe the question, as much a matter of public policy as a question of law, is whether we can take on this second larger promise of *Brown*: to provide genuine equal educational opportunity to all children. I think that it is important in framing the question of equal educational opportunity to look not only at race but also at the larger issues of class inequality.

My remarks will be broken down into two parts. In Part One, I will discuss education and equality at the kindergarten through twelfth-grade level. In my book, *All Together Now*,⁵ I argued that America would never have genuine equal opportunity unless we educate poor, middle-class, and upper-middle-class children together under a common roof. In order to create equal educational opportunities, we need economic and social integration. In Part Two, I will discuss equality in the higher education context. In my book *The Remedy*,⁶ I argued that race-based affirmative action could only carry us so far. Moreover, I maintained that we ought to be addressing the larger issues of class and equality, and furthermore, provide preferences and college admissions to low-income students of all races. Thus, equal educational opportunities also require economic affirmative action.

³ *Id.* at 493.

⁴ 411 U.S. 1, 29–35 (1972); see also Michael Rebell, *Remarks of Michael Rebell*, 78 ST. JOHN'S L. REV. 263 (2004).

⁵ RICHARD D. KAHLENBERG, *ALL TOGETHER NOW: CREATING MIDDLE CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE* (Bookings Institution Press 2001).

⁶ RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996).

Today, I would argue that there is not a crisis in public education in general. Instead, there is a crisis in high-poverty schools—the schools that large numbers of poor children attend. The idea that I have suggested in my book is that we are a middle-class country. Roughly two-thirds of American students are not eligible for free or reduced-price school lunch. Eligibility for such programs is a standard indicator of disadvantage. Furthermore, we should give every child in America the chance to attend a school comprised of a majority of middle-class students.

It is necessary to address the concentrations of poverty in America's schools. Poor children on average do worse than middle-class children academically. This is true in every society and has been true throughout time. There is, however, one exception to this: when poor children are given the opportunity to attend middle-class schools. In that situation, poor children do better than middle-class children who are attending high-poverty schools. Thus, there is something in a school's poverty level that has a large impact on the quality of the education.

As one would expect, the middle-class children generally perform better than children from low-income families. The one exception, however, is low-income children who attend middle-class schools have been found to perform better than middle-class children attending low-income schools. This is indicated by the test scores of fourth graders on the National Assessment of Educational Progress (NAEP) mathematics exam where low-income children at middle-class schools scored a 218 and 219, while the middle-class children attending low-income schools scored only a 212.

Why are high poverty schools such a problem? I believe that ten factors make for quality schools. I do not think this list is particularly controversial. Some people might add one or two factors, and some might subtract a factor. In general, however, there is something of a consensus that everyone desires these ten characteristics to provide the best education for our kids. We will find that in each case low-income schools are lacking.

First, schools want an adequate financial base. *Campaign for Fiscal Equity*⁷ (CFE) tried to address this question in New

⁷ See *Campaign for Fiscal Equity, Inc., v. New York*, 100 N.Y.2d 893, 919, 801 N.E.2d 326, 340, 769 N.Y.S.2d 106, 120 (2003) ("We agree that this showing, together with evidence that such improved inputs yield better student performance,

York City schools. Presently, on average, low-income children are attending schools that are not as well financed as their middle-class counterparts. Part of the problem that I have with the *CFE* strategy, however—and I think Professor Brittain hit on this earlier⁸—is that it only deals with part of the educational inequality.

In places such as Washington, D.C., a lot of money is spent on education, and the results are not encouraging. So, what else is needed? Ultimately, you not only need adequate finances, but you also need the money to be spent wisely. The problem with high poverty schools is that, on average, the teaching positions in these communities are some of the best jobs available. These communities are in distress, and as a consequence, there is more pressure to build the bureaucracy in these low-income communities than there is in middle-class communities. Therefore, even if the low-income schools are receiving adequate funding, it is not necessarily being spent properly.

The problem, however, is not limited to questions of money and accountability. It is also important to have an orderly environment. Learning will not go on if there is disorder in the classroom. As a good liberal, this is not something I am supposed to talk about, but I think it is crucial to address this issue because the disadvantaged children are the ones who are losing the most. The statistics tell us that disorder is twice as likely to occur in low-income schools as in middle-class schools.

Also, it is advantageous to have a stable student and teacher population. Low-income families often rent their homes and are therefore subject to eviction. They move a lot more often than middle-class families. Normally, this is thought of in terms of the impact on the students who must move. There is also, however, an impact on the children who remain behind. If students are coming in and out of the classroom throughout the year, the classroom is negatively affected. This presents a problem for teachers who must bring new children up to speed and acquaint them with the rules of the classroom. This instability is yet another disadvantage of attending a low-income school.

constituted plaintiffs' prima facie case, which plaintiffs established.").

⁸ See John C. Brittain, *Remarks of John C. Brittain*, 78 ST. JOHN'S L. REV. 281 (2004).

Teachers and principals are also crucial in establishing good schools. If life were fair, low-income children would get the best teachers because they need them the most. In reality, the opposite occurs. A variety of indicators reveal that low-income students are getting the worst teachers. Indeed, teachers moving from low-income schools to middle-class schools—even when the salaries hold constant—consider it a promotion. This is simply because it is easier to teach children who are ready to learn.

Another essential factor in creating a good school is to include a challenging curriculum and high expectations. The current legislators in Congress and elsewhere have said that it is important to have high expectations. The problem is that a grade of A in a low-income school is the equivalent of a C in the middle-class school. When you compare the children using standardized test scores, the results are heartbreaking. The children in the low-income communities who come home after receiving an A on their report card put it up on the refrigerator to the delight of proud parents. However, they are being cheated, because these children are not being held to high expectations.

Studies have also found that active parental involvement is important to schools. I am not talking about involvement in one's own child's education. That is very important as well, but every child in a school benefits when parents volunteer in the classroom and give financial donations. Membership in parent-teacher associations is approximately four times as high in middle-class schools as in low-income schools. I am going to avoid the argument that some conservatives make—that poor parents are less concerned about education. Liberals would emphasize that poor parents work two jobs and might not have time to participate. Wherever you come out on the debate, the bottom line is that parents in low-income schools are much less active than parents in middle-class schools, and this disadvantages the students.

We know from many studies, and any parent knows, that students learn as much from their peers as they do from their teachers. Thus, it is an advantage to have motivated peers. For a variety of reasons, low-income students are less engaged academically and more likely to cut class. Their peers in middle-income schools are more likely to do homework, less likely to

watch television, and more likely to graduate—all of which have been found to influence the behavior of classmates. This is yet another disadvantage that students in low-income schools face.

It is also an advantage to have high-achieving peers because they provide one more source of positive influence. One example that James Coleman cited many years ago is the acquisition of vocabulary. Low-income students tend to come to school with smaller vocabularies than middle-class children; thus a low-income or middle-class child who attends a middle-class school is exposed to much richer language. They benefit from the interaction on the playground and elsewhere. This is another reason that it is a disadvantage to attend a high-poverty school.

Finally, in looking beyond academic achievement to success in the labor market, another factor for making a good school is revealed. At least half of available jobs are filled through some sort of connection. This connection is not necessarily a close personal friend, but rather a network of acquaintances that helps people get in the door. Low-income children in high-poverty schools do not have access to this source of opportunity. They lack the well-connected peers who will help provide access to jobs in the future.

The real question is how do we get from here to there? It sounds fine, in theory, to say that we should have an economic mix in the student body in order to provide a genuine equal educational opportunity. However, the question remains: How are we going to accomplish it? I think that busing is a non-starter politically, but we have learned a great deal since the 1970s about how to create integration. There are a number of models out there that rely on a notion called "controlled choice." This is a terrible term for a good idea. Under controlled choice, there are no neighborhood schools in a particular jurisdiction. Every school is a magnet school of sorts. Each school has something distinctive at the entry points—at kindergarten, the beginning of middle school, and the beginning of high school. Parents choose from a variety of schools, but administrators then honor those choices in hopes of achieving socioeconomic or racial integration.

There is popular support for the notion of controlled choice—much more support than there is for the old style of compulsory busing. Currently, this form of socioeconomic integration is being used in a number of communities. The best known is

probably in Wake County, North Carolina, which includes Raleigh and its surrounding suburbs. A goal in Wake County is for no school to have more than forty percent of its students eligible for free and reduced lunch. Wake County Schools are scoring among the highest of all schools throughout North Carolina. Cambridge, Massachusetts also has a similar program. Comparable programs exist across Wisconsin, in San Francisco, and in a number of other places. Hartford, Connecticut also currently has a choice program due in part to the good efforts of John Brittain. In Hartford, low-income minority students are given a chance to attend suburban schools. This is not enough, but it is a substantial program. Likewise, Hartford attracts about an equal number of white suburban students to inner-city magnets. While these programs have not received a lot of attention, I believe that these communities are achieving the long-term and true promise of *Brown*.

In addressing the question of affirmative action in higher education, I think that President Bollinger is right to feel proud that he had a victory in the *Grutter*⁹ case, but to argue that we have achieved equal educational opportunity in higher education ignores dramatic economic disparities. This is particularly true of our selective colleges since race-based affirmative action has not addressed this larger economic question. We at the Century Foundation¹⁰ recently commissioned a study by Anthony Carnevale and Stephen Rose of the Educational Testing Service to look at the top 146 colleges.¹¹ We hoped to derive the economic makeup of students at these schools. What the study revealed was truly astounding. Seventy-four percent of students at the top 146 colleges hailed from the richest socioeconomic quartile of the population while only three percent came from

⁹ *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003).

¹⁰ "[The Century Foundation's] mission is to persuade those who care . . . about economic inequality, population aging, homeland security, discontent with government and politics, and national security that significant improvements are possible even when the conventional wisdom says they are not." The Century Foundation, *The Century Foundation Mission*, at <http://www.tcf.org/AboutUS/missionstatement.pdf> (last visited Apr. 6, 2004).

¹¹ Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in *AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION* 101 (Richard D. Kahlenberg ed., 2003), available at http://www.tcf.org/Publications/Education/carnevale_rose.pdf.

the poorest socioeconomic quartile.¹² The data reveal that the nation's elite campuses are twenty-five times more likely to admit a rich student than a poor one.

Affirmative action has not done much to address this disparity. The Bowen and Bok study, *The Shape of the River*,¹³ is the leading scholarly defense of affirmative action. Using data collected at twenty-eight universities, Bowen and Bok concluded that eighty-six percent of African-Americans who were admitted were middle or upper-middle-class.¹⁴ Moreover, whites are marginally better off. The study revealed that neither disadvantaged whites nor disadvantaged working class blacks are getting into these selective colleges. I think that if we are trying to achieve *Brown's* larger promise, then we must address this issue.

Colleges have two common responses to this situation. First, they say that they already do provide a preference. This morning, President Bollinger said that during his time at the University of Michigan, the school looked at socioeconomic status, along with race and family legacy among other factors.¹⁵ Carnevale and Rose studied what would happen if schools used only grades and test scores to admit students.¹⁶ They concluded that the number of African-Americans and Latinos would be four percent of the combined enrollment at the elite universities; using traditional affirmative action practices, however, when combined with grades and test scores that percentage rose to twelve percent.

I do not think that anyone would argue that these numbers are sufficient. Twelve percent is not enough when these groups

¹² *Id.* at 106 tbl.3.1.

¹³ WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* (1998).

¹⁴ *Id.* at 48-49.

¹⁵ Lee Bollinger, Remarks at St. John's Law Review's Symposium on *Brown v. Board of Education* (Nov. 7, 2003) (discussing admissions policies at the University of Michigan and the consequences of the *Grutter* and *Gratz* decisions for higher education).

¹⁶ See Carnevale & Rose, *supra* note 11, at 141-42. Using grades and test scores alone as criteria for admitting students, as opposed to using grades and test scores with affirmative action, would create a decrease in the percentage of African-American and Latino students at elite universities from 12 to 4%. The percentage of students from the bottom two socio-economic quintiles however, increases slightly from 10 to 12% using grades and test scores alone as criteria when compared to a straight system of admissions based on grades and test scores. See *id.* at 141.

represent approximately twenty-eight percent of the population. Nevertheless, the racial preference triples the numbers from four to twelve percent. With respect to students in the bottom-half of the socioeconomic scale, if grades and test scores were used, the bottom-half would represent twelve percent of the total enrollment. It is currently ten percent at elite universities.¹⁷

If universities instituted preferences for economic status comparable to what they provide for race, the bottom-half of students would comprise almost thirty-eight percent of the student population.¹⁸ Thus, if universities look above and beyond grades and test scores, the number of economically disadvantaged students would triple. Instead, the study predicted a slight decline, from twelve to ten percent. This indicates that universities are not providing much of a preference to low-income or working-class students, and the net effect of all the different preferences, including legacy preferences, suggests that these students are actually underrepresented. Ultimately, poorer children are better off with just grades and test scores.

Universities also argue, as a justification for not admitting more low-income students, that these students are not prepared to handle the work. Carnevale and Rose, however, studied this question and they found that currently, with the panoply of preferences that are provided to legacy students, athletes, and minorities, there is an eighty-six percent graduation rate.¹⁹ If economic affirmative action were used, meaning that schools admit some students based on grades and test scores, and some on a combination of grades and test scores plus economic status, we would see graduation rates rise slightly.²⁰ Therefore, we can conclude that the students currently admitted based on legacy and other preferences are slightly less able to work at the higher level than the low-income students who have been denied admission.

A number of the speakers in this symposium have invoked Derek Bell and the interest convergence theory. Thus, it is relevant to see where people's interests and values lie. Right around the time that President Bush spoke in opposition to the

¹⁷ *Id.*

¹⁸ *Id.* at 148–49.

¹⁹ *See id.* at 141.

²⁰ *See id.* at 149.

Michigan Plan, the *Los Angeles Times*, EPIC/MRA, and *Newsweek* conducted polls,²¹ seeking to discover public support levels for a number of programs, including race-based and income-based preferences. They found that roughly twice as many Americans oppose preferences based on race, and the same ratio supports preferences based on income.

Finally, a number of universities have adopted economic affirmative action. The University of California,²² University of Washington,²³ and University of Florida²⁴ each have different ways of defining economic disadvantage in their affirmative action programs. Likewise, so do the University of Texas²⁵ and UCLA Law School,²⁶ which have a more comprehensive method of viewing economic disadvantage.

²¹ See Maryanne George, *Poll: Policy at U-M Unpopular*, DETROIT FREE PRESS, Feb. 7, 2003 (describing the *Los Angeles Times* poll conducted between January 30 and February 2, 2003 and the EPIC/MRA poll conducted between January 29 and February 3, 2003), http://www.freep.com/news/education/affirm7_20030207.htm; Irene Noguchi, News Hour Extra, *Supreme Court Considers Affirmative Action* (Mar. 30, 2003) (describing the *Newsweek* poll conducted between January 16 and January 17, 2003), at http://www.pbs.org/newshour/extra/features/janune03/supreme_court.html.

²² See Richard D. Kahlenberg, *The Conservative Victory in Grutter and Gratz*, JURIST (Sept. 5, 2003) ("The University of California . . . uses 'comprehensive review'—examining academic accomplishments in light of such obstacles as 'low family income, first generation to attend college,' and 'disadvantaged social or educational environment.'"), at <http://jurist.law.pitt.edu/forum/symposium-aa/kahlenberg-printer.php>; University of California Office of the President, Comprehensive Review, at <http://www.ucop.edu/news/comprev/welcome.html> (last modified Jan. 20, 2004).

²³ See Kahlenberg, *supra* note 21 ("The University of Washington looks at academic achievement in the context of such factors as 'family income, number in family, parents' educational level, [and] high school free lunch percent.'").

²⁴ See *id.* ("The University of Florida's 'Profile Assessment' program provides a leg up to 'students who are poor, attend a low performing high school, or whose parents didn't attend college.'").

²⁵ See *id.* (stating that the University Texas Law School considers "obstacles such as 'the socioeconomic background of the applicant,' 'whether the applicant would be the first generation of his or her family to attend or graduate from an institution of higher education,' and 'the financial status of the applicant's school district'"); The University of Texas at Austin School of Law, Admissions: General Requirements, at <http://www.utexas.edu/law/depts/admissions/gen/html> (last modified Feb. 4, 2004).

²⁶ See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION: INNOVATIVE APPROACHES TO DIVERSITY 24 (2003) (stating that the University of California Los Angeles Law School has adopted a "socioeconomic preference program"), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html>. The report also found that:

Unfortunately, this list of the universities that are genuinely pursuing economic affirmative action includes universities that have been prohibited from using race as an admissions factor until recently. Economic affirmative action was used in an attempt to achieve racial diversity in an indirect manner. Thus, following the *Grutter* decision, it is not clear how much pressure there will be on the universities to continue pursuing economic affirmative action.

The more optimistic scenario is that groups previously supportive of race-based affirmative action will feel less threatened by the notion of economic affirmative action now that race-based affirmative action has been declared valid. They will be more willing to view economic affirmative action as higher education's next frontier.

As many others have already noted, with respect to race, we still have a long way to go to fulfill the promise of *Brown*. On the educational front, *Brown* was absolutely right: separate is inherently unequal. We must realize, however, that society must work to address class inequality as well.

Most students are now admitted based solely on their academic performance, but some are admitted based on a combination of academic achievements and socioeconomic obstacles overcome. Among the socioeconomic factors considered are: highest level of education attained by parents; parents' primary occupation; number of years spent in a single-parent home; age of applicant at the time of a parent's death (if applicable); total parent income and assets during the previous year; and the number of hours worked per week during the student's years in college.

Id.

